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No. 87-289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DUPAGE BANK AND TRUST COMPANY,
as Trustee of Trusts Nos. 2602 and 2439,

Petitioner,

vs.

PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE; THE McHENRY COUNTY BOARD OF REVIEW, THE COUNTY OF McHENRY, ILLINOIS, a body corporate and politic; and the TOWN OF ALGONQUIN, a body corporate and politic,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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RULE 28.1 DISCLOSURE

See Petition for Writ of Certiorari

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REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

The State of Illinois' Brief in Opposition is inaccurate in two of its premises. It then goes on to base its argument on the faulty assumptions. For this reason, reply is necessary.

I.

THE PROPERTIES COMPARED WERE FOUND TO BE ADMITTEDLY COMPARABLE.

Illinois' brief refers to the "alleged similarities" between the taxpayer's property and other parcels with lower taxes. The brief states that no findings as to such similarities were made. Illinois intimates that the substance of the comparable properties was not proved to be similar to the subject, thus justifying the difference in taxes.

To the contrary, McHenry County, the adverse party to the taxpayer at the hearing, submitted the single comparable property for comparison. It was in a different class from the subject parcel. The taxpayer admitted that the property was nearly identical to the subject and went on to prove the tax disparity between the two. See page 4 of Petition for Writ of Certiorari.

Further, the Circuit Court's opinion found, "The facts in this case are largely uncontested." The subject was assessed at $4,262 per acre while the "admitted comparable properties were assessed at a flat rate of approximately $300 per acre. The justification given by the State for this discrepancy was that the subject was technically in a different 'class' from the comparables. . ." [emphasis

added]. See Appendix, page 12a, to Petition for Writ of Certiorari.

This particular finding was never appealed by the State and was finally adjudicated by the Circuit Court. In its appeal to the Appellate Court, the State based its objection on the fact that because the properties were in different classes, they could not be compared under any circumstances. That position was sustained by the Appellate Court. (Appendix, page 8a). That is the issue before the Supreme Court.

It is important that the distinction be understood. The subject is admittedly essentially identical to other properties which, for technical reasons, are properly in different assessment classes. The taxpayer contends that because the properties are the same in substance, the form of the classification cannot be used to justify a grossly disparate tax burden of 26 times.

The State fails to offer any explanation of how the *Walters* test should be applied to highly similar, but differently classified, properties. Rather, Illinois begs the question by arguing that the properties have to have some difference or else they would not be in separate classes, and the fact of a different class, *ipso facto*, justifies a different tax. This facile argument fails to acknowledge that two highly similar lands have vastly different tax burdens solely because of their difference in classification.

Both *Walters* and *Hanover* suggest that once the taxpayer shows a gross tax disparity *between* different classes of similar properties, then the taxpayer has standing to have his higher tax declared unconstitutional as a matter of Equal Protection. *Walters v. City of St. Louis*, 347 U.S. 231, 98 L. Ed. 660, 665 (1954); *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, 508, 71 L. Ed. 372 (1926).

Here, the State attempts to justify the tax disparity by arguing that there are real and substantial differences between the properties. The record, however, shows the Respondents, themselves, submitted into evidence the comparable property. The property was admitted to be substantially similar by the taxpayer; the Circuit Court found the properties were admittedly comparable; and the State cannot now be heard to claim otherwise.

II.

THERE IS NO NECESSITY FOR THE TAXPAYER TO INVALIDATE OTHER CLASSES OF WHICH IT IS NOT A MEMBER.

The State's brief suggests for the first time in this entire litigation that the taxpayer cannot assert an Equal Protection claim to contest its own tax unless it first successfully attacks and invalidates the other statutory classes of which the taxpayer is not a member. Illinois goes on to argue that because the legislature had a legitimate governmental purpose for establishing the other classes, the taxpayer cannot succeed in attacking those classes. It concludes withe the *non sequitur* that because there is a rational basis for the other tax classes, this taxpayer cannot complain about its own tax in its own class.

Aside from this argument being barred for being first raised on appeal, it should be apparent that this taxpayer has no interest in attacking other classes. This litigation poses no threat to continued favorable tax treatment to lands classed as farmlands or open space. Those classes will remain intact regardless of the outcome of this litigation.

The issue has never been whether the other classes were valid, but whether this property, which was admitted

to be essentially identical to properties in those classes, can bear a grossly disparate tax solely because it is in a different class. The State's brief has obfuscated this issue.

The taxpayer agrees that Equal Protection will allow a different tax treatment between two highly similar, but differently classified, properties. However, under those circumstances, Equal Protection will not allow the mere form of the classification to justify a gross disparity in the tax burden.

This was the precise issue *Hanover* addressed when it held that the test of constitutionality did not turn on the form of the tax class. Instead the Court "must regard the substance rather than the form. . ." to determine whether the level of taxation between similar classes was constitutionally valid. *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, 509, 71 L. Ed. 372 (1926). The State's suggestion that *Hanover* does not impose such a test is incorrect.

Hanover, correctly interpreted, means the State can invent any form or system of tax classification it sees fit. However, Equal Protection still requires a substance over form test to compare the underlying taxes on properties which are similar in substance but classed differently as a matter of form. The State's argument that the mere fact of a difference in classification will justify a difference in tax is correct, but it fails to account for how different the tax may be if there is no significant difference between the properties in the two classes. Equal Protection requires that the tax burdens be compared in relation to the similarities between the classes.

CONCLUSION

The Petitioner prays that this Court grant the Petition for a Writ of Certiorari and, upon review, reverse the decision of the Appellate Court of Illinois and reinstate the judgment of the Circuit Court for the taxpayer on the constitutional issue.

Respectfully submitted,

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